No. 02-25

In the Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

YI QUAN CHEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

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The Ninth Circuit's decision in this case exemplifies its repeated application of erroneous rules of law that bar the Board of Immigration Appeals (BIA) from considering probative evidence and usurp the BIA's assigned fact-finding function. See Pet. 13-27; see also Pet. at 9-14, *INS* v. *Ventura*, No. 02-29 (filed July 5, 2002). The Ninth Circuit's approach to reviewing BIA asylum decisions puts it in conflict with decisions of this Court and of other courts of appeals. See Pet. 13-14, 20-22, 27. For these reasons, and in light of the large number of asylum cases that arise in that circuit (see *id.* at 29), certiorari is warranted.

1. The court of appeals' initial error in this case was its reversal of the BIA's determination that respondent did not support his asylum application with credible testimony. Respondent asserts (Br. in Opp. 4-6) that this Court's review is not warranted because the court of appeals "correctly stated" (*id.* at 4) that the BIA's findings of fact must be upheld unless "any reasonable adjudicator would be compelled to conclude to the contrary" (8 U.S.C. 1252(b)(4)(B); see Pet. App. 4a). The question presented by the petition, however, involves—not the court of appeals' recitation of the general

statutory standard—but that court's application of its own rules that defeat the standard Congress has prescribed. See Pet. 14-19. Respondent's defense of those rules is unavailing.

a. The court of appeals held as a matter of law (Pet. App. 7a-8a) that respondent's submission of counterfeit and inaccurate birth certificates during his 1995 asylum proceeding was immaterial to determining his credibility. The court gave two reasons for its conclusion: (1) that there could be "any number of reasons" for respondent's submission of fraudulent documents (Pet. App. 7a (quoting *Shah* v. *INS*, 220 F.3d 1062, 1068 (9th Cir. 2000)), and (2) that the fraudulent documents did not "enhance [respondent's] claims for asylum" (*id.* at 8a).

Echoing the court's first rationale, respondent argues (Br. in Opp. 11) that his use of the counterfeit documents in 1995 could not be deemed probative of his credibility because he offered a "plausible explanation" for them. But as respondent concedes (*ibid.*), his only "explanation" was that he did not personally obtain the documents and did not know why they stated an incorrect date of birth. See A.R. 143-145. Thus, the rule applied by the Ninth Circuit and defended by respondent is that the BIA may not consider an alien's use of fraudulent and inaccurate evidence when making a credibility determination if the alien denies responsibility for the fraud and inaccuracy. Such a legal rule squarely conflicts with the correct principles of review, which are that the alien has the burden of proving his case through credible testimony or other evidence (see 8 C.F.R. 208.13(a), 208.16(b)), and the BIA's credibility determinations must be upheld if —as in this case—a reasonable fact-finder would not be compelled to disagree (*INS* v. *Elias-Zacarias*, 502 U.S. 478, 484 (1992)).

Respondent suggests (Br. in Opp. 11) that the court of appeals' second rule—that an asylum applicant's use of coun-

terfeit documents must be ignored if the documents do not bear directly on persecution (see Pet. App. 8a) is part and parcel of the principle that "incidental" inconsistencies in an applicant's testimony will not doom his application. See *In re O-D-*, 21 I. & N. Dec. 1079, 1082 (BIA 1998). Respondent confuses the question of whether a defect in the alien's evidence can *contribute* to an adverse credibility determination, with the question of whether it will *alone* support such a determination. Cf. INS Immigration Officer Academy, *Asylum Officer Basic Training: Credibility* 27-28 (Mar. 1999) (noting that an isolated and immaterial false statement "may raise suspicions about the applicant's honesty, but would not in itself be a sufficient basis to find the applicant ineligible," whereas "[i]n most cases, a material falsehood defeats the applicant's claim"). In addition, respondent conflates two separate problems with the birth certificates he submitted—the fact that they were counterfeit, and the fact that they gave the wrong date of birth. The BIA relied, when making its adverse credibility determination, upon the counterfeit nature of respondent's evidence, not just the independently significant fact that the documents stated an incorrect birth date.[1] Pet. App. 20a; see *id.* at 56a. The BIA correctly determined (*id.* at 20a) that this is not a case in which the alien's use of a counterfeit document was explained in a manner consistent with the underlying claim of persecution, such as when the alien demonstrates "the creation and use of a false document to escape persecution by facilitating travel." *In re O-D-*, 21 I. & N. Dec. at 1083. Therefore, respondent's use of fraudulent evidence triggered the BIA's rule that an asylum applicant's "submission into evidence of

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[1] As respondent observes (Br. in Opp. 11), the false birth date that he claimed in 1995 would have enabled him to obtain (among other possible benefits under the immigration laws) placement in foster care or other juvenile care, rather than in an INS detention facility. See *Reno* v. *Flores*, 507 U.S. 292, 297-298 (1993).

at least one counterfeit document generally discredits his testimony regarding asylum eligibility" (*id.* at 1082).

b. The court of appeals also held as a matter of law (Pet. App. 8a-10a) that inconsistencies between respondent's 1995 and 1999 asylum applications were not probative of his credibility. Respondent asserts (Br. in Opp. 12-13) that a change in federal law explains his change of theories of persecution. Yet respondent did not merely change his legal argument in the 1999 proceeding. He disavowed his earlier version of the facts.

In his first asylum application, respondent stated that he assisted his father's work for a Chinese political group called the Lianjiang Democracy Club, and that his father was sent to a labor camp because of his pro-democracy activities. A.R. 175, 178-179. In his second application, by contrast, respondent stated that neither he nor any family member had "ever" been affiliated with a political group or other organization, and—when asked whether he or a family member had "ever been accused, charged, arrested, detained, interrogated, convicted and sentenced, or imprisoned"—respondent did not mention pro-democracy activities or his father's supposed detention. Pet. App. 55a; see A.R. 341, 345. Moreover, after he was detained while attempting to enter the United States illegally in 1998, respondent was asked directly whether he would be harmed if returned to China, to which he answered only that he would have to pay a fine of approximately $3000 for being smuggled out of China, and would be jailed if he did not pay. Respondent again made no mention of family planning policies or a fear of persecution on any protected ground. Pet. App. 55a; see A.R. 243-244.[2]

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[2] When respondent was asked at the 1999 hearing why he did not mention his alleged pro-democracy activities and associated persecution in his asylum application, respondent answered that there was "not particularly any reason." A.R. 142-143. Respondent does attempt to explain (Br. in Opp. 14) another set of inconsistent statements involving his marital status in 1995. See Pet. App. 20a-21a. Under different circumstances, the

c. Respondent does not dispute (Br. in Opp. 8-9) that the court of appeals rejected the BIA's cumulative consideration of the defects in respondent's evidence, and engaged in the same type of "divide-and-conquer analysis" that this Court disapproved in *United States* v. *Arvizu*, 122 S. Ct. 744, 751 (2002). See Pet. 18-19. Yet respondent suggests (Br. in Opp. 8) that disaggregated consideration of his fraudulent, false, and inconsistent evidence was required because of "the asylum context." Respondent, however, identifies no principle of asylum law (nor any principle of administrative law) that requires the BIA to disregard facts that contribute to (but might not require) an adverse credibility determination, or that forbids the BIA from determining that material defects in an alien's evidence *together* evince a lack of credibility. The BIA acted entirely reasonably when it determined that "the counterfeit documents of record, the respondent's inconsistent testimony, and the lack of explanation by the respondent" *together* formed a "sufficient basis to affirm the Immigration Judge's adverse credibility finding." Pet. App. 21a.

d. Respondent claims (Br. in Opp. 6) that the decisions of the First, Fifth, Seventh, and Eighth Circuits that are cited in the petition (at 20) do not conflict with the Ninth Circuit's cases. Yet respondent later concedes (Br. in Opp. 7) that there *is* a conflict between the Ninth Circuit's approach to reviewing the BIA's credibility determinations and the Fifth Circuit's approach.[3] Furthermore, although the other

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BIA might have excused that particular inconsistency. In light of the other, unexplained inconsistencies between the facts respondent alleged in 1995 and the facts he alleged in 1999, however, the BIA surely was not required to do so.

[3] The Fifth Circuit gives "great deference" to the credibility determinations of IJs and the BIA. *Efe* v. *Ashcroft*, 293 F.3d 899, 903, 905 (5th Cir. 2002). Contrary to respondent's assertion (Br. in Opp. 7), however, the Fifth Circuit does review the record to ensure that contested credibility determinations are supported. See *Efe*, 293 F.3d at 905 (noting specific grounds for finding a "lack of credibility"); *Chun* v. *INS*, 40 F.3d 76, 79

circuits generally hold that adverse credibility determinations "must be supported by specific, cogent reasons" and must "bear a legitimate nexus to the finding," the Seventh Circuit has explained that this rule is *not* inconsistent with highly deferential review of BIA decisions. *Mansour* v. *INS*, 230 F.3d 902, 906 (7th Cir. 2000) (internal quotation marks omitted). Rather, "[c]redibility determinations * * * should only be overturned under extraordinary circumstances, and a reviewing court should not supersede an administrative agency's findings simply because an alternative finding could also be supported by substantial evidence." *Ibid.* Certiorari is warranted on Question 1 of the petition to review the Ninth Circuit's departure from those principles.

2. For the reasons stated in the petition (at 20-27) in this case and in the petition (at 9-13) and reply brief in *Ventura*, certiorari also is warranted to address the Ninth Circuit's practice of refusing to remand unresolved issues to the BIA for administrative consideration in the first instance.

a. Respondent says that, after the court of appeals made its credibility holding, "no issues remained for which the agency needed to make an initial determination" (Br. in Opp. 18), and the court of appeals "neither made its own findings, nor assessed the evidence in the first instance" (*id.* at 22). That is flatly wrong. The court of appeals candidly acknowledged that it was deciding issues about respondent's eligibility for asylum that the BIA reasonably "did not consider." Pet. App. 11a.

Respondent ultimately takes the position that a remand was unnecessary because "*the IJ* already considered the merits of respondent's claims if his testimony were deemed credible." Br. in Opp. 17 (emphasis added); see *id.* at 21. But the IJ's holding in this case was that, even if respondent's testimony had been credible, he still would *not* have estab-

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(5th Cir. 1994) ("We conclude that the IJ's finding that Chun was not credible is a reasonable interpretation of the record.").

lished eligibility for asylum or withholding of removal. Pet. App. 56a-57a. The court of appeals therefore could not have (and did not) rely upon any merits finding of the IJ. Furthermore, because it is the BIA that renders the final decision of the Attorney General, a determination by an IJ is not a substitute for a determination by the BIA. The BIA reviews IJs' asylum decisions *de novo*, and courts must review the BIA's decision, not the IJ's superseded decision. See Pet. 4; see also *Chun* v. *INS*, 40 F.3d 76, 78 (5th Cir. 1994).

b. Respondent also says (Br. in Opp. 20-21) that if he testified truthfully, then "any reasonable adjudicator would be compelled to conclude" that his fear of persecution was objectively reasonable, as well as that the persecution he feared was on account of his opposition to Chinese family-planning policies. Respondent's argument is entirely unresponsive to the point (see Pet. 24-26) that courts of appeals lack both the statutory responsibility and the expertise to determine in the first instance whether further proceedings are required to decide an application for asylum and, if not, what the final disposition should be.[4]

Like the court of appeals, moreover, respondent does not confront the record evidence that makes respondent's entitlement to relief entirely unclear even assuming, *arguendo*, that he testified credibly. At his asylum hearing, for example, respondent testified that he feared returning to China because of the "accumulation" of his illegal marriage, his two illegal departures from China, and his escape from a government hospital in Shanghai after he was returned to China in 1996. A.R. 118; see Pet. App. 52a. Respondent said that he was unaware of any ongoing danger to his wife, who

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[4] Respondent's discussion of Legislative and Executive Branch fact-finding about Chinese population-control practices (Br. in Opp. 26-27) highlights that asylum applications may implicate sensitive political and foreign affairs issues and, therefore, the need for particular judicial restraint.

(at least by respondent's account) was equally resistant to family-planning authorities. A.R. 139; see Pet. App. 50a-51a. As the IJ observed (Pet. App. 56a-57a) and respondent implicitly concedes (Br. in Opp. 20), respondent never testified or otherwise showed that his detention in Shanghai in 1996 was on account of family-planning issues, rather than his illegal departure from China in 1995. And the record in this case contains a State Department report indicating that Chinese authorities do not enforce a family-planning policy against pregnant women on the basis that they are in an unauthorized marriage. Pet. App. 56a. In light of such evidence, the one thing that is clear is that, even if respondent's testimony were to be credited, there are substantial questions about his entitlement to relief that have yet to be addressed by the BIA.

c. Respondent suggests that if courts allowed the BIA to order further proceedings on remand, then there would be "a never-ending loop of judicial review from which an asylum applicant could never escape." Br. in Opp. 19. Respondent apparently assumes that all remand proceedings in asylum cases will result in: (1) a BIA decision denying asylum and withholding of removal, which (2) the asylum applicant would challenge on judicial review, and (3) the court would reverse. Respondent provides no basis for any of those assumptions. To the contrary, respondent asserts that few asylum decisions are appealed to the courts, and that even the Ninth Circuit affirms the BIA "75% of the time" when an appeal is taken. *Id.* at 28. Furthermore, respondent's intimation of administrative intransigence and intentional delay is contrary to "the time-honored presumption in favor of the validity of" agency determinations (*Coleman* v. *Paccar Inc.*, 424 U.S. 1301, 1306 (1976) (Rehnquist, Circuit Justice)).[5]

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[5] There is no merit to respondent's suggestion (Br. in Opp. 25-26) that judicial usurpation of the Attorney General's decision-making power is justified in order to release aliens from lawful detention. That is

d. Respondent's denial that the circuits are in disagreement (Br. in Opp. 22-23) also does not withstand scrutiny. Although respondent identifies four cases in which other circuits have not remanded to the BIA after overturning an asylum decision, he does not dispute that other circuits generally abide by the rule that a remand is required unless there are "extraordinary circumstances." *FCC* v. *National Citizens Comm. for Broad.*, 436 U.S. 775, 793 n.15 (1978) (quoting *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952)); see Pet. 27; *Ventura* Reply Br. 7. Indeed, three of respondent's four cases are decisions of the Third Circuit, which very recently demonstrated its adherence to the remand requirement after overturning an adverse credibility finding in an asylum case. See *Gao* v. *Ashcroft*, 299 F.3d 266, 279 (3d Cir. Aug. 30, 2002).

3. Finally, respondent suggests (Br. in Opp. 28-29) that the Ninth Circuit's asylum jurisprudence is not sufficiently important to warrant the Court's intervention because the Ninth Circuit ultimately reviews only a small percentage of all the asylum cases that first come before IJs. Respondent concedes (*id.* at 28) that the Ninth Circuit grants eligibility for asylum or withholding of removal to dozens of aliens per year, which itself suggests the importance of the issue. Furthermore, respondent's argument about percentages ignores that the Ninth Circuit accomplishes its reversals of the BIA through the development and application of incorrect legal rules that constrain the Attorney General's statutory discretion. See Pet. 14-19. In order to avoid appeal and reversal, the Attorney General's delegates must follow the court of appeals' rules in cases that arise within that circuit.

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particularly true in the case of an alien, like respondent, who is stopped while attempting to enter the United States illegally and without any claim of entitlement to enter the United States, and whose detention during asylum proceedings therefore serves the purpose of preventing the alien's entry into the United States while his removability is being determined. See generally *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001).

See, *e.g.*, Pet. App. 29a, 30a, 37a, 38a, 41a-42a (BIA dissenting opinion, invoking Ninth Circuit rules). Thus, the number of BIA asylum decisions reversed by the Ninth Circuit does not identify the number of asylum cases that are decided incorrectly because of the Ninth Circuit's holdings.

Respondent's calculations are significant in another respect, however. According to respondent, in the last fiscal year alone, the Ninth Circuit failed to remand in 28 out of the 55 asylum cases in which it did not affirm the BIA. Br. in Opp. 28. Thus, according to respondent's figures, the Ninth Circuit reverses and grants eligibility for asylum in a large number of cases, and it does so *more often* than it reverses and remands for further proceedings on eligibility. By respondent's own account, the Ninth Circuit plainly is not abiding by this Court's instruction that "[i]f the record before the agency does not support the agency action * * * the proper course, *except in rare circumstances*, is to remand to the agency for additional investigation or explanation." *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985) (emphasis added). The Ninth Circuit's widespread disregard for that fundamental principle of administrative law should not be allowed to stand.

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The petition for a writ of certiorari should be granted and the case should be consolidated for oral argument with *INS* v. *Ventura*, petition for cert. pending, No. 02-29 (filed July 5, 2002). Cf. *Ventura* Pet. 13-14.

Respectfully submitted.

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